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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 595

DANIEL J. DONOVAN,

Petitioner,

against

ESSO SHIPPING COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, Third Circuit, entered in the above entitled case, on August 7th, 1958, with a denial of petition for rehearing on September 17th, 1958.

Citations to Opinion Below.

The only written opinion, that of the United States Court of Appeals, for the Third Circuit (R—This refers to opinion that is supplied) is printed in Appendix A hereto, p. 16.

Jurisdiction.

The judgment of the United States Court of Appeals, for the Third Circuit, was entered August 7, 1958, Appendix A, *infra*, p. 16. Rehearing was denied on Septem-

ber 17th, 1958 (R . .). The jurisdiction of the court is invoked under 28 USC, Section 1254(1) and 2101(c).

Questions Presented.

1. In cases involving many allegations of negligence and unseaworthiness and having many causes of action set forth in the complaint, including one or more of *res ipsa loquitur,* must the plaintiff or libelant in such cases, at the trial thereof make elections and omit presenting any facts or proof even though necessary for the sustaining of any of the causes of action where the same facts and proof tend to and do contradict and explain the *res ipsa loquitur* cause of action.

2. Whether the failure to make such election and to omit such proof and facts aforestated at the trial, will result in the denial of a jury trial on the *res ipsa loquitur.*

3. Whether the court has a duty to determine on appeal all matters and alleged errors appealed from and set forth in the appeal papers, even though sufficient time is not available at the oral hearing to cover and hear all of the matters and alleged errors set forth in the appeal papers.

4. Whether a plaintiff, as the petitioner herein was in this matter, should be granted a full jury trial or trials on all allegations and causes of action of his complaint, even though he presents testimony and proof contradicting each other, in whole or in part, as long as there is sufficient proof submitted at the trial to support the individual causes or all of the alternative causes whatever the case may be.

5. Whether this case should be governed by the following United States Supreme Court decisions in *Seas Shipping Company* v. *Sieracki,* 328 U. S. 85 (1946) and the

two Second Circuit Court decisions of *Mollica* v. *Campania Sud Americana*, 202 F. 2d 24 (C. A. 1953) and *Grillea* v. *United States*, 232 F. 2d 918 (C. A. 1956), and if it was should not a full jury trial have been granted on same.

6. Whether the specific pretrial memorandum served on the defendant, which is the respondent herein, and the statement by the court in its pretrial conference order, dated October 22nd, 1956 "negligence relied on by the plaintiff is charged specifically in the complaint", was sufficiently clear and concise and therefore should have precluded the defendant on the second day of the trial from demanding a further pretrial as to the issues and would therefore be ineffective in limiting the pretrial issues and the issues set forth and embodied in the complaint and amended complaint.

7. Whether the allegations in the complaint and amended complaint made a part of the pretrial memorandum and of the pretrial order of October 22nd, 1956, alleging that the defendant failed to furnish plaintiff with safe ways, means, equipment and appurtenances, with a seaworthy vessel and appliances and proper equipment and boom and parts thereof, and to keep same free from defective, component and material weakness, and to furnish a safe place for the plaintiff to work, not only raised issues sufficient for jury determination but also to justify the presentation of the expert opinion, excluded by the court, provided by the plaintiff, that the use of a preventor on the said boom would have prevented the boom from falling and injuring the plaintiff.

8. Whether the statements made by the Appellate Court in its opinion are correct, namely, "Now for the first time appellant advances a rather novel theory of unseaworthi-

ness" and "Gravely did not see Donovan put the topping lift figure 8's on to the kingpost cleat" in view of the fact that the trial court had the "novel theory of unseaworthiness", presented to it on the order to show cause for a new trial and that the deposition states to the contrary and that as to the figure 8's not being put back on the kingpost cleat Graveley's testimony given under oath at the depositions says just to the contrary, namely, that he did see Donovan replace the figure 8's on the cleat after taking them off.

9. In the absence of specific proof to the contrary that no outside forces such as the engines of the tanker and of the tugs straining to pull the tanker back to the channel after it ran aground, that other or others were at the foot of kingpost after the petitioner was there—wouldn't the issues of unseaworthiness and *res ipsa loquitur* require jury evaluation in this matter?

10. In the absence of specific proof that the badly injured petitioner, struck directly by the falling boom according to the statement of a witness and in "no condition to answer questions" after accident, did not hurriedly run to the midships cleat not to aid and assist his employer and his vessel in an emergency, shouldn't his action at the foot of the kingpost be construed in the most favorable light to him and be construed as being undertaken by him for the best interest of the tanker and his employer and be a matter for jury evaluation?

11. As to maintenance and cure where a petitioner has two types of injuries, one of which is permanent in nature and cannot be further improved, and the other can be improved according to doctors by further treatment, and further medical treatment is being given up to the present time, is such a petitioner entitled to maintenance and cure

on the basis of his curable injury, and is he precluded from receiving maintenance and cure for failing to receive and seek rehabilitation where he was otherwise attempting to rehabilitate himself?

12. Is the failure to serve a proper notice of appeal on maintenance and cure where no harm is done to respondent thereby, still a good notice of appeal where it was inadvertently served in such form, but the transcript of the entire case, including maintenance and cure hearing was ordered and respondent was aware of this?

Statement.

The petitioner was injured on February 5th, 1954 on the tanker *Esso Binghamton* while in the employ of the respondent, as a result of the midships kingpost port after boom falling and injuring the petitioner.

At the end of the petitioner's case the trial court granted the motion of respondent for dismissal of the cause of action based on negligence and seaworthiness. Then the court discharged the jury and heard the third cause of action on maintenance and cure as a court sitting in admiralty. At the end of the hearing, rendered a judgment on said cause in favor of the respondent.

The depositions taken of the boatswain who ordered the petitioner to the after part of the tanker, where he was injured, for the purpose of preparing the said boom for topping, shows that Donovan was a conscientious, capable seaman in the boatswain's opinion. It also shows that the boatswain remained forward and was not present to direct and advise the petitioner in the performance of the said assigned work, even though Donovan was only on the boat a comparatively few days when he gave him the said assignment. It also shows that when he assigned the petitioner

to the said work he did not know or was he informed by the mate who did know, that the said port after boom had been topped by a Butterworth group who had come aboard the tanker from a launch along side the tanker, with a pump and generator weighing about 1200 pounds, which was hoisted from the launch to the aft deck of the tanker. It also shows that his statement is he did not have any conversation with Graveley after the accident, pertaining to the accident, is contradicted by Graveley in his deposition.

The deposition of Deck Maintenance man, able bodied seaman Allan Graveley would show that he and Donovan came aft about the same time. That both of them saw that the boom was topped and that he said to the petitioner, "You swing the guy lines and I'll unlash the gangway on the catwalk", and that while he was working on the catwalk he happened to look down and saw the petitioner at the foot of midship's kingpost removing two figure eights from the topping lift around the cleat. That he shouted "not that, not that, the guy lines" and that the boom did not then fall and that he saw Donovan replace the one or two figure eights of the topping lift on the cleat. At no time did he see the boom fall or commence falling. Yet when Donovan was over near the rail, port side, bending over the pad eye to which the guy line was attached—the boom did fall and struck him. Graveley says if he did what I saw him do then he could not account for the boom falling except it would be that the boom was hanging low and may have caused greater weight to be on the topping lift because it was hanging low and caused the topping lift to pull away from the cleat on the kingpost.

Graveley testified not only that Donovan replaced the figure eights of topping lift on the cleat in the same position and condition that it was when he commenced to remove the figure eights and that the method Donovan

used in resecuring the boom was a good firm one. There is no testimony by Graveley or by any one else: There was no testimony by Graveley or by anyone else that from the time the figure eights of the topping lift were replaced and resecured on the cleat of the kingpost until the time that the boom fell while Donovan was over near the rail, port side, bending over the pad eye when the boom fell and struck him, that there was or was not any one else who touched or loosened the topping lift on the cleat. An attempt was made at the depositions to have such a possibility covered by the attorney for the respondent. This attempt fizzled out because Graveley had testified that once he assured himself that the boom was properly resecured by Donovan he went back concentrating on his work. Graveley, therefore, would not know the answer. It is therefore, just as probable that there was somebody else, as it was that there were not some others at the cleat after Donovan left it who may have and did not only loosen the topping lift, but removed the topping lift entirely from the cleat and let the boom immediately come down on Donovan who was about his work on the port side of the tanker. Then again the engine of the tanker was not shut off for quite a while after the accident. The continual straining in vain of the engine of the tanker and the engines of the tug for a long period of time in an endeavor to pull the tanker, which had run aground, back into the channel, may have been the loosening force which caused the weight of the low hanging boom to become a strain on the topping lift and caused it to loosen itself from the cleat on the kingpost and fall.

All of this is stated to show other forces and agencies could have caused the loosening other than Donovan's action. The jury trial and jury determination would have been the logical solution and answer to the issues raised

here. And if the jury believed Graveley, why wouldn't it be bound to find for Donovan on unseaworthiness and *res ipsa loquitur* cause of action.

Joseph Betushak testified that he had boarded the vessel that morning and had moved the pump further aft, with other or others, and after taking the pump off the dolley he turned around and saw someone run in from the starboard side of the tanker and go immediately to the foot of the midships kingpost and commence loosening the topping lift from the cleat. He said he shouted to one fellow servant who was coming from the side of the tanker to the launch below. He said that when he shouted the person at the foot of the midships kingpost was attempting to hold back the boom and then started to move away. He did not see anything further because he was concentrating on a fellow worker coming aboard, and when he looked again he saw the petitioner lying on the deck having been struck by the falling boom. He stated that there was nobody else on the deck besides the person whom he later identified as Donovan. He testified that he could not see Graveley on the scene at the time. He differs with Graveley in that he would have the petitioner struck a short distance away from the midships kingpost and not over near the rail on the port side where Graveley testified petitioner was at the time he was struck by the falling boom. Who of the two were in the more advantageous position? None of the others who were with Betushak on the aft port side of the boat, or in the proximity of the said boom apparently did not see the accident. None of them were able to give any statement other than Betushak. Betushak admitted at the trial he would be unable to see what the man at the foot of the midships kingpost was doing with his hands at the time he, Betushak saw him at the foot of the kingpost. He admitted that he was surmising and concluding as to the

action of his hands by the movement he observed of his shoulders from 150 to 175 feet to the rear of him. This is pointed out to show once again that the whole case was built on surmise and conclusions without any concrete proof as to what the man at the foot of the midships kingpost was actually doing or not doing with his hands as far as the topping lift on the cleat of the midships kingpost was concerned.

Mr. Betushak admitted that he looked away from the kingpost and concentrated on his friend, and when he looked again somebody was lying on the deck and the boom had fallen. Wouldn't it have been just as logical that the one at the foot of the boom was taking one or two of the figure eights off in order to better secure the boom and that the boom was falling or commencing to fall when he arrived at the foot of the kingpost, and that he had previously observed this when he came on the after deck and ran towards the midships kingpost to correct this condition and to further secure the topping lift. Betushak said he saw Donovan run towards the foot of the kingpost. If he had run for the purpose aforestated wouldn't he then have been doing what he was duty bound to do as a member of the crew. Common reason dictates that there was some reason to have caused Donovan, as Betushak testified, to have run and not have walked towards the midships kingpost. So, if Donovan was hurrying and running to the cleat on the kingpost to protect his employer's interest and to prevent the tanker on which he was a member of the crew, from being damaged and being endangered, due to a loosening or slipping topping lift, certainly such an attempt, whether it was successful or not, would not have made the petitioner responsible for his action or injury in such an emergency in the eyes of the law or of the jury from a factual standpoint if the case had gone to a jury as it should have.

Betushak testified his original thoughts were that the petitioner when he first observed him, working or in action at the foot of the kingpost, that the petitioner was readjusting or resecuring the topping lift on the cleat, but when he saw the said seaman holding back the boom in his hands, he became fearful that the boom would fall and strike one of his fellow workers who was then coming aboard from the launch along side the tanker. And he then began to shout warnings towards his fellow worker. It was about that time while he was shouting that Donovan is supposed to have let go of the boom. Whether Betushak and his shouting unnerved Donovan, or that Donovan was unable to hold the boom any longer and that the boom began to slip through his hands (no burn marks were on Donovan's hands), in any event the boom fell.

What next becomes puzzling if we were to follow Betushak's testimony is that Donovan with all the protection available to him and near him on the starboard side and center of the tanker, would move or run out to the port side and under the boom which he was supposed to be just letting fall.

To go further it is most striking that Betushak should have as his original thought, that Donovan was adjusting or attempting to adjust the topping lift to better secure it at the cleat, when you read the following excerpt from the trial court's pretrial order and pretrial conference report of October 22nd, 1955:

> "The defendant admits that the plaintiff was a seaman member of the crew of the vessel, that he was subject to the orders of superior members of the crew and that on the day of the occurrence he was directed by his superior to prepare the boom for topping.
>
> However, defendant further contends that when plaintiff proceeded to obey this order he found that the boom was already topped and in the course of

adjusting or attempting to adjust the topping lift at its point of fastening allowed it to become loose • • • and to fall • • •."

All of the above are added to the statement to show that there were conflicting statements and testimony as to just how the accident happened; whether the boom fell due to the petitioner's negligence or the negligence of others on the tanker at the time; whether Donovan was actually working in the interest of his employer and of the tanker when he ran towards the midships kingpost and did what he did. All of the aforesaid, plus the fact that Graveley and Betushak differ in so many other things and in their testimony, for example, Graveley testified that the petitioner was bending over the pad eye when the boom fell and struck him. Betushak says he was walking or running and that he was not over near the rail of the port side of the main deck in the act of working on the guy line, but that he was over near the midships kingpost when he was struck by the boom. Betushak says the petitioner came aft from the starboard side. Graveley says he came aft from the port side. It is self evident that the same person could not have come on the after part of the tanker from both the port and starboard side and that he could not be doing the two different things he was supposed to have been doing at the foot of the kingpost as testified to by Graveley and Betushak. It was also of note that Graveley was not on the scene, or near the scene of the accident at the time Donovan was struck by the boom, or immediately thereafter. Betushak spent very little time according to his testimony on the aft part of the boat about the time of the accident, because as he testified, he felt nauseated. Betushak in his statement to the Coast Guard, stated emphatically that the boom struck the petitioner directly and not on a bounce as Graveley stated. If the boom struck Donovan directly, then no one would be

too surprised or shocked to be informed that thereafter Donovan found it very difficult to remember everything on the day of the accident, or around the time of the accident. The hospital records show that he was in a coma for a very long period of time after the accident.

The petitioner's memory made it very difficult for him to have a clear picture of what happened and took place on the day of the accident. He never could believe, however, that he put his hand or hands on the topping lift in question. He never remembered touching the topping lift. A New York psychologist, a hypnotist, was visited three times at his office by the petitioner. At the end of the third treatment the petitioner was able to recall, as he testified, going aft through the square, port side of the tanker, walking toward the kingpost of boom, which later fell, and that when he approached closer to said kingpost, his eyes rested and focused on the lines and he was then alerted to the fact that the boom was already topped. He then looked up at the boom in the air, turned around and commenced walking forward and away from the midships kingpost, intending to go back to his boatswain for further orders, and that while he was thus walking something happened to him. That something he learned later was the boom which fell on him.

These facts are the basis for the reasonings which are inserted under the heading of Reasons for Certiorari and they are also the basis for the contention that there were many issues of unseaworthiness, negligence and *res ipsa loquitur* which arose in this case and which should have gone to the jury and been determined by the jury.

Reasons for Granting the Writ.

1. The decision below, which involves important issues affecting many seamen, is in direct conflict with rulings of this court in *Sieracki* v. *Seas Shipping Co.*, 328 U. S. 85, of

the Second Circuit in *Mollica* v. *Campania Sud. Americana*, 202 F. 2d, 24 (1953) and *Grillea* v. *United States*, 232 F. 2d, 919 (C. A. 1956). There are no material factual differences in these cases on the issues and questions of unseaworthiness and the right to a jury trial and determination thereon and the legal issues posed in each of them is the same. The policy and determination of the *Sieracki* case and of those cases following it, are that seaworthiness "is a form of absolute duty owing to all within range of its humanitarian policy", that seamen on vessels are entitled to a safe place in which to work and that the working place can be rendered unsafe as surely by improper use of proper gear as by unfit gear ("unfitness is unfitness whether it flows from the character of the gear or that of its use"), and that the focal point is the creation, of due risks threatening a seaman or maritime worker, not the precise or variant ways in which such risks arise, and that "It may appear strange that a longshoreman, who has the status of a seaman, should be allowed to recover because of unfitness of the ship arising from his own conduct in whole or part. However, there is nothing inconsistent with the nature of the liability because it is imposed regardless of fault, to the prescribed extent the owner is an insurer, though he may have no means of, or correcting the defect. Indeed as to those, it is a kind of workmen's compensation act." (Grillea); and that "it is impossible to see what conceivable difference this (that others than libelant misplaced the covers which rocked and made libelant fall) can make in the result: Indeed if anything it confirms our ruling." (Grillea, p. 925).

The issue presented here is an important one affecting many seamen like the petitioner, who will be cast adrift and who will be blocked out from commensurate remuneration and rendered in due time mendicants depending on

public charity because of permanent crippling injuries incurred in the services of his vessel and its owner and while trying to serve and benefit his employer's interest and while obeying an improvident order given to him by his superior on board vessel, which order given to a crewman must be and was being obeyed and diligently carried out according to the strict laws and rules of the sea. Which of the decisions shall the seaman look to—the humanitarian decision of the United States Supreme Court and of the Second Circuit, or the decision of this Third Circuit herein which appeared by its decision to be strict, exacting and stern on the young conscientious seaman on the assumption that he should have seen this or been able to observe that had he looked when he was obeying the orders given to him, or he should have realized that the obeying of the orders given to him by his superior would in carrying them out result in damage or possible injury to someone because of someone else's action intervening a short time before the order was given. It is not being contended that this is in the nature of "grandstand managing the game for the manager assigned and directed by the employer to manage the team" but it comes close to it. It is not the humanitarian view that the United States Supreme Court determined for the seaman as expressed in the cases cited and in many other cases determined by the same court. Shutting one's eyes and ears to the not too friendly witness who tried to pin the blame for the boom falling not on himself though he testifies contrary to the plaintiff that he was at and close to the scene of the accident but on the plaintiff seaman who was so shocked and injured when he was struck and thrown to the deck by the falling boom that he remained in a coma in the hospital for months. Sure, there are some people who state a blow on the head or temple or a frightening experience or terrible upsetment for a long period of time,

will not go as far as to impair your memory, but there are lots of others who have been through such experiences will tell you just the opposite. The point is a skepticism seemed to prevail that there was such an impaired memory. Was this the humanitarian display? Unless someone, even a doctor or lawyer would have submitted himself to be the guinea pig to be struck down by the falling boom as the petitioner was, to be severely and permanently crippled and to lie in a coma near death for months in a hospital and then be tested thereafter as to his memory of things and events at time of the happening, and its functioning thereafter, there is no good reason to form a cynicism. Would there be such a cynicism if the humanitarian view of the seaman's conduct was there? And what did the hard working seaman do to his employers or to anyone else to put him in this bad light from the very start. The answer is nothing to offend, cheat or hurt anybody.

Conclusion.

For the above reasons a writ of certiorari should be granted as prayed for.

Respectfully submitted,

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APPENDIX A.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 12,424

DANIEL J. DONOVAN,

Appellant,

v.

ESSO SHIPPING COMPANY.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued April 15, 1958

Before GOODRICH, MCLAUGHLIN and STALEY, *Circuit Judges.*

OPINION OF THE COURT

(Filed August 7, 1958)

By STALEY, *Circuit Judge.*

The strait of Kill van Kull separates Staten Island from the mainland. In navigable waters in or near that strait, appellant seaman Daniel J. Donovan was seriously injured on the morning of February 5, 1954, while working aboard the tanker *Esso Binghamton.* The vessel was owned by appellee Esso Shipping Company, a Delaware

poration. Appellant Donovan was a resident of New rsey.

The first issue is whether appellant's injuries were caused solely by his own negligence; the second issue is whether this court has jurisdiction to review the judgment of the district court dismissing the maintenance and cure cause of action where the notice of appeal specifically disclaimed appeal from that portion of the judgment.

The complaint of appellant Donovan contained allegations of negligence under the Jones Act, 46 U. S. C. §688 *et seq.*, and of unseaworthiness, along with a count for maintenance and cure. At the end of plaintiff's evidence, the district court dismissed the causes of action as to negligence and unseaworthiness. It found that the injuries inflicted upon appellant were solely the result of his own negligence and that the tanker was in no way unseaworthy. Its conclusions were based upon the following facts.

Appellant Donovan was an ordinary seaman aboard the *Esso Binghamton.* He had worked since August, 1951, on various vessels owned by defendant.

On the morning of February 5, 1954, employees of an independent contractor, Butterworth System, Inc., were aboard the *Esso Binghamton* in order to hoist certain machinery from a launch onto the deck. For this purpose, the employees topped one of the ship's booms. The boatswain ordered appellant and a seaman named Graveley to top the boom, apparently unaware of the fact that the Butterworth personnel had already done so. The boom was held in its upright position by a topping lift fastened to cleats on the kingpost. Several figure eight turns of the topping lift were taken around the cleats of the kingpost, and finally two half hitches. The boom was thus securely held in its upright position.

According to Donovan's testimony at the trial, after the boatswain had ordered the boom topped, Donovan began walking over to the kingpost. He said he noticed that the boom was already topped. Having decided to report to the boatswain that the boom was already topped, he moved away from the base of the kingpost and paused for a short

time near the rail. While he was there, the boom fell and struck him, inflicting serious injuries.[1]

The district court correctly pointed out that this version of the accident might have brought into play the doctrine of *res ipsa loquitur*. But plaintiff did not stop here. He introduced further evidence by testimony and exhibits which attempted to explain why the boom fell. Unfortunately for appellant, this evidence showed clearly that the boom fell because appellant had loosened one or two of the figure eight convolutions of the topping lift from the kingpost.

Allen Graveley, fellow seaman of appellant Donovan, gave his testimony by deposition. According to his version of the accident, Donovan had intended to loosen the guy lines to move the boom over a catwalk or flying bridge. Evidently thinking that the guy lines were fastened to the cleats on the kingpost, Donovan removed one or two of the figure eights of the topping lift by mistake. Graveley shouted to Donovan, "Not that—the guys." Graveley said he did not see Donovan put the topping lift figure eights back onto the kingpost cleats. Donovan then left the area of the base of the kingpost and walked toward the rail. The boom there fell and injured him.

Certain statements introduced by plaintiff corroborate Graveley's testimony. The pharmacist mate stated that immediately after Donovan was injured he heard him admit, "I let go of the wrong line." The testimony of an employee of Butterworth, also introduced by plaintiff, was substantially similar to Graveley's deposition.

Taken together, all of the evidence points to one inevitable conclusion: the injuries plaintiff sustained were the result of his own negligence.

Appellant's claim of unseaworthiness was initially limited to the alleged faulty supervision of the boatswain in giving Donovan the order to top the boom, it being agreed that the gear was not defective. The district court was

[1] This version which appellant gave on direct testimony is the version of the accident appellant told his hypnotist after his third hypnotic treatment. The treatments were ostensibly given to revive appellant's clouded memory.

correct in finding that the evidence did not sustain liability on this theory.

Now for the first time, appellant advances a rather novel theory of unseaworthiness. He argues that loosening the topping lift made the boom unseaworthy, and that a seaman may recover even though the unseaworthy condition is created solely by his own act. He cites *Grillea* v. *United States*, 232 F. 2d 919 (C. A. 2, 1956), to support his theory. From our reading of the *Grillea* case, however, we do not see that it stands for this proposition. The cogent argument of appellee adequately answers appellant's contention. The appellee points out that an unseaworthiness recovery is mitigated to the extent of the seaman's own negligence. See *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 94 note 11 (1946). If the injury is caused exclusively by the seaman's negligence, there can be no recovery at all. It is therefore a hollow thing to say that a seaman has a cause of action for a condition created solely by him, but that he cannot recover damages.

Furthermore, there was no showing that the boom was unseaworthy either before or after the act of Donovan in loosening the topping lift. It functioned normally; i.e., upon the loosening of the topping lift, the boom descended. Nor could it be said that the topping lift itself was defective because it did not hold the boom and prevent its fall. There is no evidence that the rope was in any way defective, and the topping lift of course functioned normally when it slipped around the cleat after having been loosened by appellant. Thus, the district court properly dismissed the unseaworthiness cause of action.

We pass now to the separate count on maintenance and cure. Appellee raises the serious question of whether this court has jurisdiction to review the judgment of the district court on this phase of the case. It is appellee's position that appellant lost his right to have us review the maintenance and cure decision by his notice of appeal, which reads:

> "Notice is hereby given that the plaintiff above-named, hereby appeals to the United States Court of Appeals for the Third Circuit, from the judgment

entered in this action on May 3rd, 1957, dismissing on motion of defendant, all causes of the complaint, other than that cause of complaint on maintenance and cure."[2]

It is the notice of appeal which gives the court of appeals jurisdiction. Section 2107 of Title 28 of the United States Code provides that "no appeal shall bring any judgment * * * before a court of appeals for review unless notice of appeal is filed * * *." Rule 73(b) of the Federal Rules of Civil Procedure further provides that "The notice of appeal * * * shall designate the judgment or part thereof appealed from * * *."

The filing of a simple notice of appeal was intended to take the place of more complicated procedures to obtain review, and the notice should not be used as a technical trap for the unwary draftsman. A defective notice of appeal should not warrant dismissal for want of jurisdiction where the intention to appeal from a specific judgment may be reasonably inferred from the text of the notice and where the defect has not materially misled the appellee. *Railway Express Agency* v. *Epperson*, 240 F. 2d 189 (C. A. 8, 1957); *Hoiness* v. *United States*, 335 U. S. 297 (1948); *Arizona* v. *United States*, 346 U. S. 907 (1953),

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[2] On May 3, 1957, after the plaintiff's evidence, the district court stated in an oral opinion that it would dismiss the count of the complaint on negligence and unseaworthiness. No order or judgment was entered until June 6, 1957, and that order and judgment dismissed all three causes of action in the complaint; namely, negligence, unseaworthiness, and maintenance and cure.

If the notice be read to appeal from judgment entered on May 3, 1957, it appeals from nothing, since no judgment was entered on that date. There is in appellant's typed appendix a purported signed stipulation amending the notice of appeal to state that the judgment was entered on June 6, 1957. We will consider this stipulation, although it was apparently not filed and therefore not part of the record. Only by changing the judgment date to June 6, 1957, can the notice have any legal effect at all. Since the judgment of June 6, 1957, dismissed all three causes of action, it follows that the phrase "other than that cause of complaint on maintenance and cure" was not intended to be descriptive of the judgment appealed from, but was intended to limit the scope of the appeal.

reversing 206 F. 2d 159 (C. A. 9, 1953). For example, an appeal from the denial of a new trial may under exceptional circumstances be treated as an inept attempt to appeal from the judgment which preceded that denial. See *Greenwood* v. *Greenwood*, 224 F. 2d 318, 319 (C. A. 3, 1955).

While mere technical omissions in the notice of appeal should not deprive appellant of his right of review, where the appeal is taken specifically only from one part of the judgment the appellate court has no jurisdiction to review the portion not appealed from. *Carter* v. *Powell*, 104 F. 2d 428 (C. A. 5), cert. denied, 305 U. S. 611 (1939); *Gannon* v. *American Airlines, Inc.*, 251 F. 2d 476 (C. A. 10, 1957).

The notice of appeal in the present case contained more than the type of omission held fatal in the cases cited immediately above. Here there was not a neglect to mention the maintenance and cure count; the notice of appeal specifically sought review of the dismissal of all causes of action "other than that cause of complaint on maintenance and cure."[3] Since appellant unmistakably disclaimed the intention to seek review of the maintenance and cure portion of the judgment, this court is without jurisdiction to consider it.

Our decision is without prejudice to any later suit by appellant to recover whatever maintenance and cure to which he might then be entitled. *Calmar S. S. Corp.* v. *Taylor*, 303 U. S. 525, 532 (1938); *Cookingham* v. *United States*, 184 F. 2d 213, 215 (C. A. 3, 1950), cert. denied, 340 U. S. 935 (1951).

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[3] Appellant's decision not to appeal from the maintenance and cure determination as manifested in the notice was apparently prompted by his evaluation that his strength on appeal lay in the negligence and unseaworthiness counts, and not in the count on maintenance and cure. The record discloses that appellant had received maintenance and cure in the amount of nearly $12,000, and the district court found that the evidence was not sufficient on which to base a finding that further cure would be beneficial. The district court found further that appellant was not entitled to future maintenance and cure because he had refused rehabilitation treatment.

The district court had taken the maintenance and cure count from the jury and tried it as a court sitting in admiralty. On post-trial motions, it determined that normally, under circumstances present here, the count should have been tried to a jury. It makes no difference, however, inasmuch as the district court determined that the evidence in this case was insufficient to submit to a jury. Under our decision of *Jordine* v. *Walling*, 185 F. 2d 662 (C. A. 3, 1950), if there is diversity of citizenship and an adequate jurisdictional amount involved, a maintenance and cure count may properly be tried to a jury on the civil side of the court.

The judgment of the district court dismissing the complaint as to negligence and unseaworthiness will be affirmed. The appeal from that portion of the judgment on maintenance and cure will be dismissed.

A true Copy: ——

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B.

Cases Cited.

As to *Res Ipsa Loquitur.*

Thomas v. *Conemaugh Block Lick Railroad,* 133 F. Supp. 533 (U. S. District Court, Western District of Penna., July 28, 1955), per Gourley, Chief Judge held 1. On motions for directed verdict or judgment n. o. v., where uncertainty as to existence of negligence arises from conflicting testimony or fair-minded men will honestly draw different conclusions from the undisputed facts, the choice of conflicting versions of the way the accident happened, decisions as to which witness is telling the truth and the inferences to be drawn from both controverted and uncontroverted *facts are for the jury.* 2. In circumstantial cases under the F. E. L. A., where proof to a degree of absolute certainty is rarely attainable, it is sufficient if proof is such as to satisfy a reasonable mind; the domain of the jury may not be narrowly bounded and the settling of any question of negligence or proximate cause, where several rational possibilities are invoked on evidentiary facts, is exclusively within the domain of the jury. 3. Plaintiff produced ample evidence, together with inferences reasonably to be drawn therefrom, to require submission to the jury of the question of whether or not decedent met his death as a result of the first, second, or the combination of all theories advanced by plaintiff.

Res Ipsa Loquitur & Circumstantial Evidence,
12 NACCA, page 124.

Warner v. *Terminal R. Ass'n of St. Louis,* 257 S. W. 2nd 75 (Sup. Ct. of Missouri, Div. No. 1, April 13th, 1953) per Van Osdol, Commissioner.

Res ipsa loquitur and circumstantial evidence.

Sudden descent of elevator without known cause—*res ipsa* applied—plaintiff not obliged to exclude every inference other than negligence—liberal discovery rules no bar to relying instead on *res ipsa loquitur.*

The plaintiff was a baggage hauler in defendant's station, and was hauling a series of baggage wagons attached to each other. There was a hydraulic elevator from the station platform to the subway floor. Control rings operated the elevator. Elevator suddenly descended when portion of wagon was on elevator and it descended, throwing plaintiff to floor. Inspection and subsequent test revealed no defects and no unusual behavior of elevator. Verdict of $8500 back and head injuries.

Held affirmed. The facts raised a reasonable inference of negligence and permit the application of *res ipsa loquitur.* The plaintiff is not required to exclude every other inference and the liberal rules of discovery do not render the doctrine of *res ipsa loquitur* obsolete.

Comment: The Missouri Court properly said: "If a plaintiff in such a case were required to produce evidence which would exclude every reasonable theory but that of the negligence of defendant the doctrine would be annihilated" (79).

The court also rejected defendant's argument that because of discovery techniques allowing production of documentary evidence, entry upon premises, taking of photographs, etc., that plaintiff now had equal knowledge or means of information as to the cause of the occurrence.

On April 21, 1953 the St. Louis Court of Appeals decided a case against the same defendant involving an almost identical accident. (*McClintock* v. *Terminal R. R. Ass'n of St. Louis,* 257 S. W. 2nd 180.) It was held that the sudden descent of the elevator without apparent cause, while plaintiff and co-employee were attempting to put a "bull wagon" on it made a *prima facie* case under *res ipsa loquitur.* The court also discussed the effect of discovery rules on *res ipsa.*

The claim that modern procedure makes *res ipsa* unnecessary is a patent fallacy. Very often the defendant's witnesses will state, truthfully or otherwise, that they do not know the cause of the injurious event. • • •

Preventer

Plaintiff attempted to show by an expert that a preventer would have prevented the boom from falling.

See *Troupe* v. *Chicago D & G Bay Trans. Co.*, 234 F. 2d 253 (U. S. Ct. of Appeals, 2nd Circ., June 1, 1956), Judge charged

> "It is enough if the steps and paint are commonly used and accepted in the industry at the time" is erroneous.

This case commendably illustrates and bolsters the sound majority rule that, on the issue of negligence, while evidence of defendant's conformity to custom is admissible, it is not decisive. Custom is not the test or measure of due care or the standard of conduct. Neither the shipping industry nor any other trade, craft or calling can be allowed to set the standard by dictating that conformity to custom forecloses a finding of negligence.

See: *T. J. Hooper*, 60 F. 2d 737 (2d Circ. 1932), holding tugs unseaworthy for failure in 1928, to install radio receiving sets by which they could have received warnings of bad weather—thereby enabling them to seek shelter for their tows. There, Judge Hand persuasively stated:

> "Indeed in most cases reasonable prudence is in fact common precedence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It may never set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission."

See also: *Poignant* v. *United States*, 225 F. 2d 595 (2d Cir. 1955), noted 17 NACCA L. J. 175-179, where stewardess slipped on apple peel in passageway; issue: whether ship moving garbage by cans in passageway instead of garbage

disposal chutes; held: that comparable vessels were not provided with such chutes, while admissible, was not conclusive, for conformity to an improvident custom is no defense.

As was stated in *Troupe* case at page 260:

> "While the customary practice of the industry is relevant and admissible the defendant's standard of care in a negligent action is not limited to complying with usual practices in the industry or trade."

In *Bimberg* v. *Northern Pac. Ry.*, 217 Minn. 187, 14 N. W. 2d 410, at 413 (1944), it was acutely stated:

> "Local usage and general custom, either singly or in combination, will not justify or excuse negligence. They are merely foxholes in one of the battlefields of law, providing shelter but not complete protection against charges of negligence."

Accord *Maize* v. *Atl. Ref. Co.*, 352 Pa. 51, 41 A. 2d 850, 853 (1945); *Grant* v. *Chero-Cola Bottling Co.*, 176 N. C. 256, 97 S. E. 27 (1918), wherein it was held to be error to charge that defendant's conformity to customary procedures in bottling soda would exempt of liability. *Compare* the discriminating discussion in 2 Harper & James, The Law of Torts, 173, pp. 977-982; Morris "Custom and Negligence", 42 Col. L. Rev. 1147 (1942); and 172 A. L. R. 1141.

Judge Frank in a concurring opinion in the *Troupe* v. *Chicago D & G. Bay Transit Co.* case, *supra*, at page 261 said that

> "'particularly here plaintiff was entitled to assume that the judge would pay attention to the legally obvious, since she is a 'ward of admiralty' to the protection of whose interests he should have given unusual care."

The plaintiff claims a prime issue on this appeal was that he was denied the jury trial on the many issues raised

at the trial and that it was serious error for the Court to have denied him such jury trials and to have prevented a jury from determining the importance of a Preventer. Sketch of preventer is being inserted herein.

Jury Trials—Unseaworthiness

The court in *Troupe* v. *Chicago D & G. Bay Transit Co.*, 234 F. 2d 253 (U. S. Ct. of Appeals, 2nd Circ., June 1, 1956), where there was a diversity of citizenship and suit commenced on negligence and unseaworthiness on law said —the court found that there was evidence of slipping on a recently painted and slippery staircase, wet by rain, and the court held a jury on such evidence could have found that the steps were so painted and maintained as to be excessively slippery, especially when covered with rain water. Therefore, the trial judge erred in directing a verdict for defendant on the unseaworthiness claim. It should have gone to the jury.

See also: *Krey* v. *United States*, 123 F. 2d 1008 (2nd Circ. 1941), where it was held that the absence of a handle or rail in a shower bath of a vessel at sea and a soapy shower room made the vessel unseaworthy.

See also: *Tarkington* v. *U. S. Lines Co.*, 222 F. 2d 358 (2d Circ. 1955), where it was held that saddle soap on a hatchway ladder made ship unseaworthy—(longshoreman's suit) commented on in 16 NACCA L. J. 266-268.

See: *Carter* v. *Schooner Pilgrim*, 238 F. 2d 702; (1st Cir. Nov. 30, '56) where the court held, reversing judgment below on a directed verdict that plaintiff's evidence based on negligence under the Jones Act and unseaworthiness was sufficient to take case to the jury. Plaintiff in that case was thrown out of his bunk and injured when a sea struck the vessel. Plaintiff contended his injury was due to the inadequacy of sideboards on his bunk.

Court held:

> "Although this case may be close on the issue of negligence and unseaworthiness, that does not justify either the district court or this court usurping

the function of the jury. The fundamental and sacred right of a citizen to a jury trial should be zealously guarded by the courts." *Jacob* v. *City of New York*, 315 U. S. 752 (1942) (at p. 705).

In the *Nunes* v. *Farrell Lines*, 227 F. 2d, 619 (1st Cir. 1955), the court properly ruled that there was sufficient evidence of defendant's negligence in furnishing unsafe tools and appliances and on seaworthiness count to carry plaintiff to jury.

Schultz v. *Penn. R. R.*, 350 U. S. 523 (1956), 18 NACCA L. J., 221. *Roth* v. *Bird*, 239 F. 2d 257 (5th Cir. Dec. 26 '56) held it was for the jury to say whether the loss of defendant's ship and the death of decedent was due to unseaworthiness caused by improperly loading of vessel.

Mason v. *Lynch Brothers Company*, 228 F. 2d 709 (U. S. Ct. of Appeals, 4th Cir.). Plaintiff an able bodied seaman acted as a tankerman, or as captain of tug. No certificate. Formerly his conduct might have formerly been an assumption of risk of his calling—it would not now, of course, bar recovery; but as contributory negligence it would only go to reducing the amount of his recovery.

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Supreme Court of the United States

OCTOBER TERM, 1958

No. 595.

DANIEL J. DONOVAN,

Petitioner,

against

ESSO SHIPPING COMPANY,

Respondent.

MEMORANDUM IN OPPOSITION TO THE GRANTING OF A PETITION FOR WRIT OF CERTIORARI ON THE GROUND THAT THE APPLICATION FOR THE WRIT WAS NOT MADE WITHIN THE TIME PRESCRIBED.

WALTER N. CONNOR,
Attorney for Respondent,
120 Broadway,
New York 5, N. Y.

Supreme Court of the United States

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Respondent represents to the court as follows:

1. It appears on page 1 of the petition that the judgment in the District Court was affirmed by the United States Court of Appeals for the Third Circuit on August 7, 1958 and that plaintiff's (petitioner) petition for a rehearing was denied on September 17, 1958.

2. The present petition was filed on December ~~18~~ 22, 1958, more than 90 days after entry of the order denying the petition for a rehearing by the Court of Appeals and the period for applying for a Writ of Certiorari has not been extended by a justice of this court.

3. Respondent denies that the petition raises any important questions of law or that there is any disagreement among the Circuit Courts and asserts that there is no basis for an issuance of a Writ of Certiorari. Because of the fatal defect in complying with the rule for applying for the Writ of Certiorari, the merits of the petition are not here argued.

4. An error on page 1 of petitioner's petition should be called to the court's attention. Contrary to the statement in the petition, there was a written opinion in the District Court which may be found in 152 F. Supp. 347 (Copy is attached hereto). The opinion of the Court of Appeals affirming the judgment of the District Court will be found in 259 F. 2d 65.

IT IS SUBMITTED THAT PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI HAVING BEEN FILED OUT OF TIME SHOULD BE DENIED.

Respectfully submitted,

WALTER X. CONNOR,
Attorney for Respondent,
Office and P. O. Address,
120 Broadway,
Borough of Manhattan,
City of New York 5.

OPINION.

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

DANIEL J. DONOVAN,
Plaintiff,
against
ESSO SHIPPING COMPANY,
Defendant.

Civ. A. 839-55.

Appearances:

FRANCIS M. McINERNEY, Jersey City, N. J. for plaintiff.

STRYKER, TAMS & HORNER, Newark, N. J. by WALTER X. CONNOR, New York City for defendant.

WORTENDYKE, District Judge

This is an action brought by a seaman under the Jones Act (46 U. S. C. A. §688) to recover damages for personal injuries sustained by the plaintiff on February 5, 1954, in the service of the defendant's vessel, *Esso Binghamton*, on navigable waters within the jurisdiction of this Court. Under a separate count in the same action plaintiff seeks from the defendant owner expenses for maintenance and cure under the principles of Admiralty.

At the time of the accident plaintiff was 21 years of age and an ordinary seaman on board defendant's vessel. He had been employed on this and other similar vessels owned by the defendant for a period of almost four years. His injuries resulted from contact with a boom with which he was struck when it fell as a proximate result of *his* loosening and removing from a cleat some of the turns of the topping lift which supported it and to which the topping

lift had been fastened while the boom had been used by representatives of an independent contractor in hoisting certain articles of heavy machinery aboard the vessel. Because of the absence of any evidence tending to show negligence or unseaworthiness on the part of defendant or its vessel proximately causal of the plaintiff's injuries, the cause of action under the Jones Act was dismissed at the close of the plaintiff's case on liability.

Over the objection of the plaintiff the Court thereupon discharged the jury, and, sitting in Admiralty, received the evidence on the cause of action for maintenance and cure.

There is no doubt that plaintiff suffered severe injuries, which have resulted in substantial and permanent disability. Although plaintiff is precluded from performance of the duties of a seaman, there was medical evidence that he is capable of participating in gainful employment not involving physical exertion imposing strain upon the lower back, right hip and right lower extremity. Despite absence of any specific evidence of direct or indirect trauma to the plaintiff's head, a neuropsychiatrist who examined him just a year after the accident testified that, in addition to the concededly neurological orthopedic disability and the neurological changes manifested in the right lower extremity, he found symptoms which he interpreted in the aggregate as indicative of a post-concussion syndrome.

At the time of trial plaintiff still required the assistance of a cane in walking, and was wearing a brace on his right lower leg. Since the accident he has made several attempts to resume employment, but because of difficulty with his right leg he was unable to continue at any one job for more than five months.

Immediately after the accident, on February 5, 1954, plaintiff was hospitalized in Bayonne (New Jersey) Hospital and placed under the care of Dr. Francis Boyle. Hospitalization terminated on May 19, 1954, after which the plaintiff continued to receive office treatments from Dr. Boyle which extended over a year, at least twice weekly, until August 11, 1955, when Dr. Boyle discharged the plain-

tiff as having reached maximum cure. In December, 1956, the plaintiff was again hospitalized, this time for about 8 days, for palliative treatment of a neuritis of the right leg, which was deemed to be a sequel of his original injuries. Since his latest release from the hospital he has resumed reception of periodic office treatments from Dr. Boyle. These treatments have continued up to and including the time of trial, and have been and will continue to be rendered gratuitously.

Plaintiff concedes that defendant has expended for his benefit in excess of $11,922 by way of maintenance and cure since the date of the accident. That total may be broken down as follows: $2,732.41 for the initial hospitalization through May 19, 1954; $1,609 for doctors' services up to the date when plaintiff was discharged as having reached maximum cure; $4,060 for nursing services; $1,271 to the plaintiff's mother in consideration of her attendance upon him at home after his return from the hospital; and $2,250 in cash payments to the plaintiff.

A seaman injured in the service of a vessel is entitled to care and maintenance at her expense. *The Osceola,* 1903 189 U. S. 158, 23 S. Ct. 483, 47 L. Ed. 760; *The Mars,* 3 Cir., 1907 149 F. 729. The shipowner's obligation to render medical assistance and treatment continues "for a reasonable time," not limited by the duration of the voyage but does not extend beyond the " 'expense of effecting a cure by ordinary medical means,' " and does not include " 'extraordinary medical treatment or treatment after cure effected as completely as possible in a particular case.' " *The Bouker No. 2,* 2 Cir., 1917, 241 F. 831, 835 (quoting from The C. S. Holmes, D. C., 209 F. 970). More recently (1948) the Supreme Court of the United States in *Farrell* v. *United States,* 336 U. S. 511, at page 519, 69 S. Ct. 707, at page 711, 93 L. Ed. 850, has indicated that the right of a seaman to maintenance and cure "does not hold a ship to permanent liability for a pension, neither does it give a lump-sum payment to offset disability based on some conception of expectancy of life." The Court in *Farrell* limited the liability for maintenance and cure to the time

when the maximum cure possible has been effected. That decision expressly disclaimed any intention to overrule *Calmar Steamship Corp.* v. *Taylor*, 1938, 303 U. S. 525, 58 S. Ct. 651, 82 L. Ed. 993, which sets forth the present criterion in these cases. "The seaman's recovery must therefore be measured in each case by the reasonable cost of that maintenance and cure to which he is entitled at the time of trial, including, in the discretion of the court, such amounts as may be needful in the immediate future for the maintenance and cure of a kind and for a period which can be definitely ascertained." *Calmar* case, 303 U. S. at page 531, 58 S. Ct. at page 655.

Plaintiff, of course, had the burden of sustaining his claim for maintenance and cure by the evidence offered in support thereof. *The San Antonio*, D. C. Pa. 1931, 1 F. Supp. 221, affirmed 3 Cir., 61 F. 2d 623. Appraising the evidence in a light most favorable to plaintiff's contentions, we are impelled to the conclusion that when his attending orthopedic surgeon, Dr. Boyle, discharged him from treatment on August 11, 1955, maximum improvement of the disability resulting from the injuries which he had sustained in the service of defendant's vessel had then been achieved. Although the second hospitalization in December 1956 involved an expense in the amount of $147.90, that treatment was for the relief of a pressure neuritis secondary to an old injury, and moreover, the evidence fails to show whether or not the cost of that second hospitalization was reimbursed by the defendant as part of the maintenance and cure payments which defendant concededly and voluntarily made. There is a similar absence of evidence tending to show that the expense of the foot braces which plaintiff was compelled to wear as a result of the injuries which he sustained in the service of the vessel was not included in the voluntary payments by the defendant to the plaintiff or for his account.

After he had completed his testimony on plaintiff's principal claim for indemnity, Dr. Boyle was recalled by the plaintiff in support of the claim for maintenance and cure. He testified that he had been paid for all of his services to

the plaintiff to March 2, 1955 and that all subsequent services which he had rendered and was continuing to render were being furnished without charge to the plaintiff. The doctor explained that all treatments given to the plaintiff since he was discharged on August 11, 1955, were for the purpose of reducing disabling pain and that the extent of future treatments of similar character and for a similar purpose was not susceptible of definite prediction.

Dr. Raymond P. Reilly, who examined plaintiff on two occasions (December 20, 1954 and March 17, 1955) expressed the opinion that continued physiotherapy might be helpful in the treatment of circulatory obstruction, and that such treatment might be necessary for a period of a few years in the future in order to achieve a possible improvement.

Based upon his neuropsychiatric examination made of the plaintiff on May 4, 1957, Dr. Rubin A. Gerber expressed the opinion that he found the plaintiff in what the doctor characterized as a "post-concussional state" superimposed upon the admittedly permanent defects of the orthopedic injuries which the plaintiff had sustained. He expressed the opinion that the plaintiff would require considerable further treatment but was unable to determine the nature, frequency or duration of such treatment without first having what he described as the benefit of "medical, neurological, neuropsychiatric and neurosurgical work-ups". In addition to treatment for the orthopedic disability this doctor expressed the view that the plaintiff would require future psychiatric treatments; estimating all future treatments to extend for a period of approximately two years and to involve "at Workmens Compensation rates" a probable cost of from $1,000 to $2,500 for the orthopedic treatments and $300 for the psychiatric treatments.

Disregarding the testimony of defendant's expert, Dr. George H. Hyslop, who was of the opinion that further treatment was contra-indicated, I find the evidence insufficient to support findings of fact (1) that defendant has not discharged its obligation to plaintiff to provide the means of cure of the injuries sustained by plaintiff in the occurrence complained of in this action; or (2) that fur-

ther treatment will be likely to effect a diminution of the permanent disability from which plaintiff suffered on August 11, 1955 in consequence of his injury; or (3) that, if further treatment would probably be effective to work an improvement in plaintiff's condition, such treatment would be of any particular kind in any particular field or be of such probable frequency and extend over such an aggregate period of time and involve such probable cost as would justify an award at this time in any specific amount to provide for such future treatment. In sum, therefore, I find no evidence which might support a determination that the defendant has not fully discharged its obligation to the plaintiff to furnish maintenance and cure on account of the injuries which the plaintiff sustained on February 5, 1954 in the service of the defendant's vessel.

There is another factor which would preclude any future award to the plaintiff for maintenance and cure. I refer to the plaintiff's failure to avail himself of the facilities of the New Jersey Rehabilitation Commission for his restoration to the status of an employable. As was pointed out in the *Calmar* case, *supra*, and reiterated in *Wilson* v. *United States*, 2 Cir., 1956, 229 F. 2d 277, a seaman injured in the service of his vessel is required to mitigate his damages by availing himself of all existing facilities for his rehabilitation. In *Johnson* v. *United States*, 1947, 333 U. S. 46, 68 S. Ct. 391, 92 L. Ed. 468 the seaman's refusal to avail himself of the gratuitous facilities of various Government hospitals recommended by the doctors of the United States Public Health Service who treated him, led to the affirmance of the decision of the Ninth Circuit Court of Appeals that the seaman had forfeited his right to maintenance and cure.

The factual situation with which the Court was confronted on defendant's motion to dismiss the second count of the complaint is strongly suggestive of that presented to the Second Circuit Court of Appeals in 1954 in *Desmond* v. *United States*, 217 F 2d 948, 949, and the language of Judge Frank in that case seems peculiarly apposite here:

> "And when meaningful hopes for recovery end, the shipowner's liability ends. (Citing the *Calmar*

case.) No different answer is suggested by testimony of the libelant's medical witness that further treatments are indicated. The treatments to which he refers are for a period subsequent to the date of trial and not for the period for which maintenance and cure have been allowed. But even assuming that these treatments would have been appropriate during the period in question, it does not follow that the respondent would be liable for their cost. For the physician indicated that the purpose of the treatments were (sic) not primarily to cure the patient, but to 'carry him along' to relieve him, and to 'make him more comfortable'."

In 1955 Chief Judge Clark of the same Circuit in *Buch* v. *United States*, 220 F. 2d 165, 166, reversed the District Court's award of maintenance and cure to an injured seaman by reason of "a lack of definite evidence to support the award" because libelant's expert had expressed doubt whether his suggested future rehabilitation program would effect any improvement in the patient's condition and because the patient had shown no inclination to the date of the trial to undertake the program.

There has been no evidence in this case as to future maintenance and cure which would fulfill the requirements of certainty and immediacy set forth in the *Calmar* case, *supra*.

Since the trial of the case, the Court has come to believe that the plaintiff was entitled to a jury trial with respect to his claim for maintenance and cure as well as his claim under the Jones Act. See *Rey* v. *Colonial Navigation Co.*, 2 Cir., 1941, 116 F. 2d 580; *Moyle* v. *National Petroleum Transport Corp.*, 2 Cir., 1945, 150 F. 2d 840. However, since there is no jury question presented by the evidence, to have retained the jury would not have affected the outcome. Since the evidence does not support a recovery for the plaintiff, the defendant's motion for judgment should prevail.

An order may be submitted in accordance with the opinions herein expressed.